SUPREME COURT OF THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

and

MOTION TO DEFER CONSIDERATION OF PETITION

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. .....

PEABODY COAL COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND MOTION TO DEFER CONSIDERATION OF PETITION.

Peabody Coal Company prays that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Seventh Circuit entered in the above case on December 2, 1960, and the decree of said Court rendered on April 5, 1961.

OPINIONS BELOW.

The opinion of the Court of Appeals entered on December 2, 1960, is reported at 284 F. 2d 810 and is attached as Appendix A. The order of the Court of Appeals entered on December 2, 1960, is attached as Appendix B. The order of the Court of Appeals denying a petition for rehearing entered on January 17, 1961, is attached as Appendix C. The final decree of the Court of Appeals entered on April 5, 1961, which was not published is attached as Appendix D. A certified record in said case, together with the proceedings in the Court of Appeals for the Seventh Circuit is furnished herewith.

JURISDICTION.

The opinion and order of the Court of Appeals were entered on December 2, 1960, and the final decree of the Court was entered on April 5, 1961. The Respondent has filed a petition for clarification or modification of the opinion of December 2, 1960. The Court of Appeals has not acted on said petition. On March 1, 1961, the time for filing petition for writ of certiorari by the Petitioner herein was extended by order of this Court to May 1, 1961.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Section 10 (e) of the Labor Management Relations Act of 1947, as amended.

QUESTIONS PRESENTED.

The questions presented for review are:

1. Whether an order of the Court of Appeals restraining an employer from "in any other manner interfering

with, restraining or coercing employees" in the exercise of rights guaranteed under the Labor Management Relations Act of 1947, as amended, is too broad.

2. Whether an order of the Court of Appeals requiring an employer to cease and desist from encouraging membership in a certain named union, or in any other labor organization, by discriminating in regard to hire or tenure of employment, or any term or condition of employment, is too broad, in view of the reference to "any other labor organization" and in view of the finding of the Court that there was no discrimination in regard to hire or tenure of employment.

3. Whether the furnishing of a list of names of its employees by an employer to a union engaged in a campaign to supplant an incumbent union as bargaining representative of the employees, constitutes unlawful assistance to the aspiring union under the Labor Management Relations Act of 1947, as amended, where the incumbent union already had such information.

STATUTES INVOLVED.

The statutory provisions which are relevant to decision of this case, and the pertinent text of which is set forth in Appendix E, are Sections 7, 8 and 10 of the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U. S. C. A., Secs. 157, 158 and 160.

STATEMENT.

This petition seeks to review the final decree of the Court of Appeals which was rendered upon separate petitions of Peabody Coal Company (the "Petitioner") and the United Mine Workers of America, its District 12, and its Locals 1227 and 1229 (hereinafter collectively referred

to as "UMW") to review and set aside, and a cross petition of the National Labor Relations Board (the "Board") to enforce, a decision and order of the Board.

The incidents out of which this case arose had their inception in May, 1956 when the Petitioner, Peabody Coal Company (Peabody), acting through a subsidiary, acquired control of two coal mines in St. Clair County, Illinois (J. A. 8-9, 199-200).* At this time, these two mines were being operated under Progressive Mine Workers of America (Progressive) labor union contracts (J. A. 9, 204). Peabody also operated about 27 other mines under contracts with the United Mine Workers of America, including the National Bituminous Coal Wage Agreement of 1950, as amended (J. A. 9, 18-19, 55, 699-717).

In about June of 1957, the UMW commenced an active campaign to organize the employees of the O'Fallon and Millstadt mines (J. A. 685-687, 693-695). The unfair labor practice charges and complaints arose out of the ensuing conflict between UMW and Progressive during this organizing campaign.

As aptly expressed by the Court of Appeals, "Fundamentally, this is a struggle between the Progressive Mine Workers of America (Progressive) and the United Mine Workers of America (UMW) with the employer, Peabody, being more or less in the middle" (App. A, p. 2).**

On about October 2, 1957, Peabody, through a process of merger and liquidation of its subsidiaries, acquired direct ownership of the two mines, and therefore is now the only employer involved in this case. Upon presentation of UMW membership cards signed by almost 100% of the

* References to "J. A." are to the Joint Appendix which is a part of the certified record of the proceedings in the Court of Appeals.

** References to "App." are to the appropriate Appendix incorporated in this petition.

miners at the two mines, Peabody recognized the UMW as exclusive bargaining representative of the employees at the two mines; and entered into a collective bargaining agreement with the UMW covering the employees (J. A. 554).

Thereupon, Progressive officials filed charges of unfair labor practices against Peabody and UMW, and the General Counsel of the Board filed two separate complaints against Peabody and the UMW, which were later consolidated into one case. A hearing was held before a Board Trial Examiner at St. Louis, Missouri, in October, 1958. The Trial Examiner found that Peabody (and UMW) had engaged in conduct violative of Section 8 (a) (1), (2), (3) and (5) of the Labor Management Relations Act of 1947, as amended, and made recommendations which in his opinion would remedy the alleged unfair labor practices (J. A. 44-49).

Upon a hearing before the Board, the Board in its decision and order dated December 30, 1959, substantially adopted the Trial Examiner's conclusions and recommendations (J. A. 57-62).

Upon petitions of Peabody and UMW to review and set aside, and upon the cross petition of the Board, the Court of Appeals, in its opinion rendered December 2, 1960, and its order entered on the same date, modified the order of the Board, and directed that as modified the order was to be enforced. On April 5, 1961, the Court of Appeals issued its final decree which in substance required that Petitioner cease and desist from (1) giving effect to the collective bargaining agreement entered into between Petitioner and the UMW; (2) recognizing UMW as the representative of its employees at the O'Fallon and Millstadt mines of Petitioner unless and until UMW shall have demonstrated its exclusive majority representative status pursuant to an election to be conducted by the Board as early as possible under applicable rules, regulations and prac-

tices, it being understood that Peabody need not bargain with any union until the Board has certified the results of the election; (3) assisting and contributing support to UMW, or to any other labor organization; (4) encouraging membership in UMW or in any other labor organization of its employees by discriminating in regard to hire or tenure of employment, or any term or condition of employment; and (5) in any other manner, interfering with, restraining or coercing employees in the exercise of the right to self organization.

Further, the Court of Appeals directed the Petitioner to take the following affirmative action: (1) withdraw and withhold all recognition from UMW for the purpose of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment or other conditions of employment, unless and until said labor organization shall have demonstrated its exclusive majority representative status pursuant to a Board conducted election; (2) make whole employees at the two mines involved for any loss of earnings they may have suffered by reason of a discriminatory lockout; and (3) preserve necessary records and post appropriate notices.

It is upon the final decree of the Court of Appeals entered on April 5, 1961, that this petition for writ of certiorari is based.

REASONS FOR GRANTING THE WRIT.

1. The decree of the Court of Appeals entered on April 5, 1961, contains provisions in the cease and desist portion of the order which have been held to be too broad by other Courts of Appeal, and which appear to be in conflict with the holdings of this Court with respect to similar provisions.

The decree of the Court of Appeals issued on April 5, 1961, requires that Petitioner, cease and desist from, among

other things, "in any other manner interfering with, restraining or coercing employees" in the exercise of their rights under the Labor Management Relations Act of 1947, as amended (App. D, p. 19).

This Court, in the case of **Communications Workers of America v. National Labor Relations Board**, 362 U. S. 479 (1960), has held that the use of the words "or any other employer" in a cease and desist order against a union was unwarranted, and ordered the words stricken from the order. In this case, the Court notes that the Court of Appeals for the Sixth Circuit had already required the words "in any manner" to be deleted from the order.

The Ninth Circuit Court of Appeals, in the case of **Morrison-Knudsen Company v. National Labor Relations Board**, 276 F. 2d 63, 76 (1960), also ordered stricken the portion of a Board order which incorporated the words "in any other manner restraining or coercing employees."

The Third Circuit Court of Appeals, citing the **Communications Workers** case of this Court, required the words "or any other labor organization" and "or by discriminating in any other manner in respect to hire . . ." to be deleted from the proposed order of the Board. **National Labor Relations Board v. U. S. Steel Corporation et al.**, 278 F. 2d 896, 903 (1960).

2. The April 5, 1961, decree of the Court of Appeals also requires that Petitioner cease and desist from encouraging membership in a named labor organization, "or in any other labor organization of its employees, by discriminating in regard to hire or tenure of employment . . ." (App. D, p. 19).

The use of the phrase "or in any other labor organization" would fall in the class of phrases discussed above which are too broad.

Furthermore, the Court of Appeals, in its opinion of December 2, 1960, stated:

> "No employee of either of the coal mines . . . complained of any coercion or discriminatory conduct" (App. A, p. 2).
>
> "Furthermore, in the transition from Progressive to UMW, no employee at either mine lost his job. Membership in UMW was not a condition of employment. An employee did not need to belong to UMW to retain his employment" (App. A, p. 8).
>
> "In the instant case, no employee did lose his job in the change-over to UMW" (App. A, pp. 11-12).

It is submitted, therefore, that the order of the Court of Appeals is too broad in its references to "any other labor organization" and to "discriminating in regard to hire or tenure of employment."

3. Throughout the various hearings in this case, before the Trial Examiner, before the Board and before the Court of Appeals, there has arisen considerable confusion concerning the status of federal law with the respect to the effect of an employer's furnishing a list of its employees to one of two contending labor organizations.

As the trial examiner stated in his intermediate report, there was "small question of fact" as to the furnishing of such a list by Peabody to UMW during the organizing conflict with Progressive. The trial examiner further said, "Although there is no evidence that Progressive made a similar request, since this labor organization exclusively represented both mines it is reasonable to suppose that it already possessed such a list." The trial examiner concluded as follows:

> "It appears reasonable to conclude that the furnishing of these lists to White was in the nature of

assistance by the employer to United [UMW], since these officials had fore knowledge—or belief as to their use by United [UMW]. It appears somewhat short of reasonable, however, in the opinion of the Trial Examiner to hold, as General Counsel alleges in the complaint and urges in his brief, that such 'assistance', *per se*, was 'unlawful'.

"The Trial Examiner considers that **Morganton Full Fashioned Hosiery Company** (107 NLRB 1535), cited by United [UMW] in its brief, contains the governing conclusion. There the Board declined to set aside an election on the ground that a list of employees had been furnished to one labor organization and not to another, under circumstances essentially similar to those existing here. The Board said:

> "In view of the absence of any request by the Union for a mailing list or any valid excuse for the Union's failure to request such list from the Employer, we find no improper assistance to the Petitioner or interference with the election as the result of the incident hereinabove mentioned.

"The Trial Examiner concludes and finds, therefore, that the furnishing of the above-described lists did not, *per se*, constitute unlawful assistance to United [UMW] and interference within the meaning of the Act as alleged by the Complaint. The **fact** of assistance, however, as a detail in the larger picture of events described below, may well have bearing upon other issues" (J. A. 14-15).

The Board, in its decision, reconsidered this finding of the trial examiner, and concluded as follows:

"1. The Trial Examiner found that the furnishing of a mailing list of employees by Peabody to UMW was in the nature of employer assistance to UMW

but not *per se* unlawful. Without passing on the matter of whether the conduct was *per se* unlawful, we agree with the Trial Examiner's conclusion, for the record shows, as detailed in the Intermediate Report, that Peabody assisted UMW by numerous other acts. In this context we find that furnishing a mailing list to UMW constituted unlawful assistance in violation of Section 8 (a) (2) of the Act." (Citing **Wagner Iron Works**, 104 NLRB 445, 447, in a footnote.) (J. A. 54.)

When the issue of the effect of furnishing the lists was raised in the instant case before the Court of Appeals it was decided as follows:

> "We think the furnishing of the lists by itself would be no basis for the conclusion of the Board. Even considered with other acts of assistance, it is a slender reed on which the Board, in part, vests its decision. Although of relative small importance in the case, we are not disposed to interfere with the Board's decision as to the effect of furnishing lists" (App. A, pp. 6-7).

The Board itself, in two other cases, **Morganton Full Fashioned Hosiery Co.**, 107 NLRB 1534, and **The DeVilbiss Co.**, 115 NLRB 1164, held that the furnishing of a list to one of two contending labor organizations in a representation case was not unlawful assistance. In the **Morganton** case, which was cited with approval in the DeVilbiss case, the Board said that it could not agree with the hearing officer's holding that the employer's furnishing of a list to one of the two contending labor organizations without notifying the other that it had given such list comprised undue assistance. The Board then proceeded: "Absent either a request by the Union for that list or a showing that such a request would have been futile, it cannot be found that the Employer gave undue or improper assistance to the Petitioner."

The case of **Wagner Iron Works**, 104 NLRB 445, 447, cited by the Board as authority for its holding in the case at bar, is obtuse on the question of the effect of furnishing a list. In the **Wagner** case the trial examiner found that the employer's furnishing a mailing list of employees to an AFL union, one of two contending unions, was evidence, together with other acts, of domination. The Board, however, merely held that it did not agree with the trial examiner's finding of domination, but held that there was unlawful assistance, without indicating whether or not the grounds were the same as those cited by the trial examiner as the basis for his holding of domination.

In any event, the **Wagner** case preceded both the **Morganton** and **DeVilbiss** cases, which appear to be the most recent expressions of the Board on the subject until the case at bar.

Although the Court of Appeals indicated that it felt the issue was "of relative small importance" in the instant case, it is submitted that this is a question which affects a great number of employers and labor unions and should be settled by this Court.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for certiorari be granted, subject to the motion to defer consideration which follows.

MOTION TO DEFER CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI.

Petitioner moves the Court to defer consideration of the foregoing Petition for a Writ of Certiorari, and in support of such motion shows as follows:

The Respondent has filed with the Court of Appeals a Petition for Clarification or Modification of the opinion of

the Court rendered December 2, 1960, which has not been ruled upon by the Court. Petitioner understands that Respondent may file a petition for writ of certiorari in this case, and Petitioner believes that consideration of its petition should be deferred until it is determined whether or not Respondent will file a petition in order that all of the issues in this case may be before the Court at one time.

Respectfully submitted,

V. LEE McMAHON,
1783 Railway Exchange Building,
611 Olive Street,
St. Louis 1, Missouri,
Counsel for Petitioner.

APPENDIX A.

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

September Term and Session, 1960.

No. 12889

Perry Coal Company and
Peabody Coal Company, et al.,
Petitioners,

v.

National Labor Relations Board,
Respondent.

No. 12915

United Mine Workers of America,
et al.,
Petitioners,

v.

National Labor Relations Board,
Respondent.

On Petition to Review and Set Aside and on Cross-Petition to Enforce a Decision and Order of The National Labor Relations Board.

December 2, 1960

Before Duffy and Schnackenberg, Circuit Judges, and Mercer, District Judge.

Duffy, Circuit Judge. Appeal No. 12889 is before this Court upon the petition of Peabody Coal Company (Peabody) to review and set aside an order of The National

Labor Relations Board[1] issued against Peabody and also against the petitioners in appeal No. 12915.

Appeal No. 12915 is before the Court upon petition of the United Mine Workers of America, its District 12, and its Local Unions 1227 and 1229, to review and set aside the same order of the Board. In its answer which applies to both appeals, the Board has requested enforcement of its order.

The charging party is the Progressive Mine Workers of America. Among the sections of the Labor Management Relations Act claimed to have been violated are: Sections 8 (a) (1); 8 (a) (2); 8 (a) (3); 8 (a) (5); 8 (b) (1) (A) and 8 (b) (2).

No employee of either of the coal mines hereinafter described complained of any coercion or discriminatory conduct. Fundamentally, this is a struggle between the Progressive Mine Workers of America (Progressive) and the United Mine Workers of America (UMW) with the employer, Peabody, being more or less in the middle.

For many years prior to the summer of 1957, Progressive and its Local 167, represented employees of Midwest Radiant Corporation (Midwest) at the Millstadt mine, and Progressive and its Local 75 represented employees of Perry Coal Company (Perry) at the O'Fallon mine. This representation was accomplished by means of labor agreements between Progressive and its Locals 167 and 75 and Coal Producers Association of Illinois of which Perry and Midwest were members.

For many years prior to the summer of 1957, Peabody, as a member of the Illinois Coal Operators Association, had recognized UMW as the exclusive bargaining representative at twenty-seven other mines which it owned

[1] 125 N. L. R. B. No. 110 (Dec. 30, 1959).

and operated in Illinois and other parts of the country. The collective bargaining agreement included the National Bituminous Coal Wage Agreement of 1950 as amended, and the Wage Agreement and Working Conditions of District No. 12.

The 1952 amendment provided that the Agreement covers the operation of all of the coal lands owned or held under lease by the coal operators, or acquired during the term of the contract. This amendment was carried forward and preserved by the 1956 amendment which provided that the Agreement covered all of the bituminous coal mines owned or operated by the coal operators who were parties to the agreement.

Through a process of liquidation and merger occurring about October 3, 1957, the properties of Perry and Midwest became the properties of Peabody. The only employer now involved in these proceedings is Peabody.

In May or June, 1957, which was after Peabody acquired control of the Millstadt and O'Fallon mines, Hugh White, president of UMW's District 12, notified Hartman, general mine superintendent of Peabody, and McCollum, a vice president of Peabody and formerly a vice president of Perry, that Peabody must comply with the provisions in the National Bituminous Coal Wage Agreement by recognizing UMW and applying the terms of the contract at the Millstadt and O'Fallon mines. His demand was not based upon a claim that District 12 represented any of the employees at these mines.

McCollum and Hartman agree the contract applied to all Peabody operations, and stated that they would apply the contract as a matter of course when their contract with Progressive expired, and when UMW could show that it represented a majority of the employees.

In May or June, 1957, White obtained from Hartman a list of the names and addresses of the employees of the

Millstadt mine, and obtained from McCollum a similar list of the employees at the O'Fallon mine. Both Hartman and McCollum knew UMW planned to attempt to organize the employees of the two mines. Hartman testified that such lists which were partially incorrect, had been previously furnished to charity organizations, manufacturers' representatives, insurance men and others.

On July 1, 1957, White sent letters to all employees at both mines. At this time the mines were closed down for the annual vacation period. The letters recited that UMW had served notice on Peabody that it must comply with the provisions in the National Bituminous Coal Wage Agreement, and that all provisions of that contract be applied at the Millstadt and O'Fallon mines. It invited all employees to become members of UMW, and enclosed a membership card upon which it requested the signature of the person addressed.

On July 4, 1957, Roy Dupee, president of Progressive's District No. 1, wrote Peabody, cautioning it to comply with the Progressive agreement and the wishes of "your employees as to Union affiliation." Peabody did not reply to Dupee's letter. Dupee made numerous telephone calls to Peabody at St. Louis to ascertain the company's position concerning the demand of UMW. No one in authority would or did answer.

The annual vacation period at both mines was scheduled from June 28 to and including July 8. However, at Millstadt, certain repair work was in progress, and the opening date there was re-scheduled to July 15th. The mine did reopen on July 29th. O'Fallon was reopened on July 22nd.

While the mines were closed, Peabody withdrew from the Coal Producers Association of Illinois, and also gave notice to Progressive that it would terminate the con-

tract between them on September 30, 1957. On August 4, 1957, Dupee wrote Peabody protesting Peabody's contemplated termination of the agreement, and requested Peabody to meet with Progressive as the employees' bargaining representative to negotiate a new agreement. Peabody did not respond to this request to bargain. On September 30, 1957, Peabody terminated its contract with Progressive and ceased making payments to the Progressive Welfare and Retirement Fund. On October 1, 1957, Peabody recognized UMW, and applied the UMW contract at the Millstadt and O'Fallon mines.

The Board adopted substantially all of the trial examiner's conclusions and recommendations. The Board found Peabody violated Section 8 (a) (2) and (1) by assisting and supporting UMW, a) by furnishing UMW with lists of its employees at the two mines; b) by discriminatorily locking out employees at Millstadt from July 15 to July 20, 1957, and at the O'Fallon mine from July 9 to July 20, 1957, in order to encourage membership in UMW; c) during the periods of lockouts, threatening employees with continued lockout; d) by refusing to bargain with Progressive; e) by terminating the bargaining agreement with Progressive on September 30; f) by discontinuing payments to Progressive's Welfare and Retirement Fund on September 30; g) by entering into an exclusive bargaining contract with UMW at a time when that Union did not represent an un-coerced majority of employees; and h) by entering into a contract containing illegal closed shop provisions. The Board also found the conduct of Peabody violated Section 8 (a) (3) and (5) of the Act.

The Board found and determined UMW violated Section 8 (b) (1) (A) and (2) of the Act by demanding Peabody enter into a collective bargaining agreement with it; by its letter of July 1, 1957, addressed to each employee of the two mines; and by its newspaper ad addressed to mine employees stating UMW was requiring

Peabody to apply the provisions of the UMW contract at the two mines and by entering into contracts containing illegal Union-security provisions.

Peabody claims and offered testimony tending to prove that the reopening of the Millstadt mine was delayed for economic reasons, and the reopening of the O'Fallon mine was delayed for safety reasons, but the trier of the facts found otherwise. The examiner and the Board relied to a considerable extent upon statements made by vice president McCollum, general superintendent Hartman, and mine superintendent Schroeder, to the effect that the mines would not reopen and operate unless UMW was designated as bargaining representative by the employees.

True, these officers denied making many of the statements relied upon, but we cannot disturb credibility resolutions made by the Board. **NLRB v. Wagner Iron Works**, 7 Cir., 20 F. 2d 126, 142. The weight to be attached to and the credibility to be accorded testimony is a matter for the trier of the facts. **Sunshine Biscuits, Inc. v. NLRB**, 7 Cir., 274 F. 2d 738, 741.

The trial examiner found the furnishing of the mailing lists to UMW did not "constitute unlawful assistance to United and interference within the meaning of the Act. * * *" The Board disagreed. It did not say the furnishing of the lists was illegal *per se*, but that the furnishing of the lists in the context of other acts of assistance constituted illegal assistance, citing **Wagner Iron Works**, 104 N. L. R. B. 445, enforced, **NLRB v. Wagner Iron Works**, 7 Cir., 220 F. 2d 126.

We think the furnishing of the lists by itself would be no basis for the conclusion of the Board. Even considered with other acts of assistance, it is a slender reed on which the Board in part, rests its decision. Although of relatively small importance in this case, we are not disposed

to interfere with the Board's decision as to the effect of furnishing the lists.

The National Bituminous Coal Wage Agreement of 1950 contains the following provision: "It is further agreed that as a condition of employment all employees shall be, or become, members of the United Mine Workers of America, **to the extent and in the manner permitted by law**" (Emphasis supplied).

An integral part of the same printed document which contains the above quoted provision is: "Wage Agreement and Working Conditions between the Illinois Coal Operators Association and The International Union United Mine Workers of America and District No. 12, United Mine Workers of America." This agreement bears the effective date of April 1, 1941 and provides that it remains in full force and effect in its provisions * * * except where they have been amended, modified and or nullified by the National Bituminous Coal Wage Agreements incorporated in this book."

The trial examiner found the requirement of UMW membership contained in the 1941 district agreement was an integral part of the UMW's National Bituminous Coal Wage Agreement and concluded that it provided for an unlawful closed shop. The Board agreed, but went further and held the Union security clause in the 1950 agreement provides for an unlawful closed shop in spite of the provision "* * * to the extent and in the manner provided by law." Such a holding is contrary to our decision in **Lewis v. Quality Coal Corporation**, 270 F. 2d 140.

The Board seeks first to distinguish **Quality Coal** on the ground that that case involved private litigation. It then asks us to reconsider our decision in **Quality Coal**, and cites the same cases which this Court considered and rejected when it handed down the **Quality Coal** decision.

It is entirely immaterial that **Quality Coal** arose in the context of private litigation. The question that was fully litigated in that case was decided adversely to the present position of the Board.

We decline the cordial invitation of the Board to abandon our decision in **Lewis v. Quality Coal Corporation.** We adhere to that decision. For whatever significance it may have, it also is of interest to note that the United States Supreme Court denied certiorari in **Quality Coal**, 361 U. S. 929.

We are of the view and hold that the Board was in error in holding the 1941 agreement, which provided for a closed shop, was not amended or modified by the 1950 agreement. It seems clear that the contracting parties contemplated that changes might be necessary under the law, and evinced a desire to conform to such changes.

The intention of the parties is also shown by the manner in which employment practices were carried out at the two mines. No employee claims his rights under Section 7 were violated. Furthermore in the transition from Progressive to UMW, no employee at either mine lost his job. Membership in UMW was not a condition of employment. An employee did not need to belong to UMW to retain his employment.

Where two constructions of a written contract are possible, preference is given to that one which does not result in a violation of law. **Great Northern Railway Co. v. Delmar Co.**, 283 U. S. 686, 691.

The National Agreement by its own terms prevails over the District Agreement. The clear and unequivocal phrase in the National Agreement renders inoperative the union security provision of both agreements.

We hold the Board was in error in finding and concluding Peabody violated Section 8 (a) (1) and (3) of the

Act by entering into and maintaining a contract which contains closed shop provisions, and that UMW violated Section 8 (b) (1) (A) and (2) of the Act by demanding, entering into and maintaining a contract which contained closed shop provisions.

The Board's order requires that Peabody and UMW jointly and severally "reimburse all employees for moneys illegally exacted from them" and to "make whole" employees for any loss suffered by reason of the discriminatory discontinuation of the Progressive Fund payments." An issue which we must decide is whether such a remedy is appropriate under the facts of this case.

The Supreme Court discussed the power of the Board to order affirmative remedies in **Republic Steel Corporation v. NLRB**, 311 U. S. 7. The Court there stated, page 11: "* * * We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.' * * * (citing cases)."

In **Virginia Electric & Power Company v. NLRB**, 319 U. S. 533, the Supreme Court held that reimbursement of dues was an appropriate remedy to effectuate the purposes of the Act. However, the Court expressly limited the decision in that case to the particular facts before it, and refused to express an opinion on the merits of eleven cases in five different circuits which refused to enforce similar Board orders. It is of interest to note

that the **Virginia** case concerned a company-dominated union, and all the employees had to join the union and remain members thereof in order to retain their jobs.

In **Western Union Telegraph Company v. NLRB**, 2 Cir., 113 F. 2d 992, the Court refused to enforce a refund order similar to the one here under consideration. The Court said, page 997: "It by no means inexitably follows, because an employer has so conducted himself towards a union as to disqualify it from acting as collective bargaining agent for all his employees, that he has inflicted pecuniary damage upon each member of the union. * * * *"

In his concurring opinion in the **Virginia** case, supra, Justice Frankfurter pointed out the significant distinction between cases like **Western Union** and **Virginia**. He said, 319 U. S. at page 545: "But the vital difference between the **Western Union** and this case is that, in the former, 'there was no evidence that all those (employees) who asked to have their wages stopped, did so in any part because they were coerced.' * * * Here the employees had no such choice; they could avoid the check-off of union dues only by giving up their jobs."

In **Local 357, Teamsters Union v. NLRB**, D. C. Cir., 275 F. 2d 646, the Court refused to enforce a dues-reimbursement order except as to an individual who was actually discriminated against by the illegal hiring hall agreement. The Court said the order went too far in directing reimbursement to all casual employees.

It is the Board's view that the presumption of coercion is conclusive once the unfair labor practice is shown. However, in **NLRB v. United States Steel Corporation**, 3 Cir., 278 F. 2d 896, the Court refused to accept this argument and declined to enforce the order because there was no evidence that any employee was coerced. The Court was under the impression that this Court had de-

cided to the contrary in **NLRB v. Local 60, United Brotherhood of Carpenters**, 273 F. 2d 699, but stated, at page 90: "there is a growing body of authority, some of it very forcefully and clearly written, supporting our view."

In **NLRB v. Local 60, United Brotherhood of Carpenters**, this Court approved the Board's finding that the contract contained an unlawful closed shop clause. The Board ordered reimbursement and this Court said it was a proper remedy because the "record does support the Board's finding that such fees were coerced in that there was present an implicit threat of loss of job if those fees were not paid." (273 F. 2d, at 703). Significantly, the opinion went on to hold, "The burden rested on the respondents to show that even without the unlawful discrimination, the Company's employees would have maintained their membership in Local 60" (273 F. 2d; at 703). The Supreme Court has recognized the contrary holdings of our **Local 60** opinion and that of the District of Columbia Court of Appeals in the **Local 357** case, and has granted certiorari in both cases.

Of course, we shall follow the decision of this Court in the **Local 60** case if it is controlling under the facts of the instant case. For the reasons hereinafter stated, we hold that our decision in **Local 60** is not controlling in the case at bar.

In **Local 60**, not only was the hiring agreement found to be unlawful, but two employees were declined employment by reason thereof. This Court found reimbursement of dues proper "to restore employees to the position they would have enjoyed but for the illegal practices" (273 F. 2d, at 703).

By contrast, in the case at bar, there are no findings that dues were paid under coercion or under any threat or implied threat of loss of job. In the instant case, no

employee did lose his job in the change-over to UMW. No employee complained or testified that he was coerced into signing dues cards. There is clear evidence in the record that membership in UMW was not a condition of employment. Furthermore, at the time of the contract with Peabody, employees at both mines, by cards, and by election at O'Fallon, indicated their choice of UMW.

In the great majority of cases raising the issue of dues reimbursement, only one union was involved. In such cases, were it not for the unfair labor practices, it is quite possible the employees involved would not have paid any dues. Here the employees were all union men. True, they had been members of Progressive and not UMW, but during the period that UMW collected its dues, the employees received all of the rights and benefits of belonging to UMW. These employees would have paid union dues regardless of any unfair labor practices.

Inasmuch as there are no findings of actual coercion in the instant case nor any evidence which would have supported such findings, we hold that part of the order requiring reimbursement of dues paid, should not be enforced.

We next consider the requirement of the order that Peabody and UMW jointly and severally "make whole employees for any loss suffered by reason of the discriminatory discontinuation of the Progressive Fund payments." We note that payments were made by Peabody into that fund during the entire duration of the contract with Progressive. To say that at the time the old contract expired, a new contract would have been entered into with Progressive, would seem to be sheer speculation. The General Counsel asked the trial examiner to reinstate Progressive's contract but he refused to do so. The Board makes no mention of this part of the examiner's

intermediate report, so we assume the Board adopted the action of the trial examiner in that respect. Nevertheless, the Board's order, in effect, reinstates at least part of Progressive's contract.

Since October 1, 1957, Peabody has paid into UMW Welfare and Retirement Fund, royalty payments of 40 cents a ton for every ton which it has sold from the O'Fallon and Millstadt mines. If it had made payments into the Progressive Fund, the amount would have been 20 cents a ton. There should be no windfalll to employees which might enable them to draw from both funds for the period when they would be entitled to receive payments from one or the other. Such part of the Board's order is penal in effect and should not be enforced.

UMW claims the order is too broad. It specifies three objections: 1) Paragraph 2 (a) (3) of the order is merely a command to broadly obey the statute; 2) the order and notice should be limited to the employees of the two mines involved; and 3) the inclusion of "any other employer" is invalid in paragraph 2 (b) (3) of the order.

The Board has the power to make an order like paragraph 2 (a) (3), **NLRB v. Cheney California Lumber Co.**, 327 U. S. 385. Whether it is justified depends on the circumstances of each case. **NLRB v. Express Publishing Co.**, 312 U. S. 426. The Board argues the reason for the paragraph was that the illegal contract covered all Peabody employees. But, since we hold the contract is valid, the order should be limited to UMW's and Peabody's actual unfair labor practices in this case.

Under the authority of **NLRB v. United Brotherhood of Carpenters**, 7 Cir., 276 F. 2d 694, the order should be limited to the employees of the two mines involved.

The words "or any other employer" in paragraph 2 (b) (3) of the order should not be enforced. **Communica-**

tions Workers v. NLRB, 362 U. S. 479. UMW was not found to have engaged in violations against the employees of any employer other than Peabody. In any event, the whole clause should be stricken since the contract did not violate the Act.

The Order of the Board, modified as indicated in this opinion, will be enforced.

No. 12889

Schnackenberg, Circuit Judge. For the reasons set forth in my opinion in **Lewis v. Quality Coal Corporation**, 270 F. 2d 140, 144, I dissent from those parts of Judge Duffy's opinion which are inconsistent with my said views.

In all other respects I concur with his opinion.

APPENDIX B.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois
Friday, December 2, 1960.

Before
Hon. F. Ryan Duffy, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Frederick O. Mercer, District Judge

Perry Coal Company and Peabody Coal Company, et al., Petitioners, vs. National Labor Relations Board, Respondent:	On Petitions to Review and set Aside an order of the National Labor Relations Board.
No. 12889	
United Mine Workers of America, et al., Petitioners, vs. National Labor Relations Board, Respondent.	
No. 12915	

This cause came on to be heard on the petitions to review and set aside an order of the National Labor Relations Board, the answer and request for enforcement of said order, the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the order entered in this cause by the National Labor Relations Board on December 30, 1959, be modified as indicated in the opinion of this Court filed this day, and as so modified the said order will be enforced.

APPENDIX C.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois
Tuesday, January 17, 1961.

Before
Hon. F. Ryan Duffy, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Frederick O. Mercer, District Judge

Perry Coal Company, et al., United Mine Workers of America, et al., Petitioners, vs. National Labor Relations Board, Respondent.	Petitions for Review of an order of the National Labor Relations Board.

No. 12889-12915

It Is Ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, Denied.

APPENDIX D.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

Perry Coal Company, Midwest-Radiant Corporation and Peabody Coal Company, Petitioners, v. National Labor Relations Board, Respondent.	No. 12889.
United Mine Workers of America; District 12, United Mine Workers of America; Local Union 1227, United Mine Workers of America; and Local Union 1229, United Mine Workers of America, Petitioners, v. National Labor Relations Board, Respondent.	No. 12915.

Decree.

Before: Duffy and Schnackenberg, Circuit Judges, and Mercer, District Judge.

This cause came on to be heard upon petition of Peabody Coal Company to review and set aside an order of the National Labor Relations Board, dated December 30, 1959, issued against Peabody and against the United Mine

Workers of America et al.; and also upon petition of the United Mine Workers of America et al. to review and set aside the same order of the Board. In its answers and cross-petitions the Board requested enforcement of its order. The Court heard argument of respective counsel on September 27, 1960, and has considered the briefs and transcript of record filed in this cause. On December 2, 1960, the Court being fully advised in the premises handed down its decision enforcing, as modified, said order of the Board. In conformity therewith it is hereby

Ordered, Adjudged and Decreed by the United States Court of Appeals for the Seventh Circuit that the Petitioner, Peabody Coal Company, its officers, agents, successors and assigns shall

a. Cease and desist from

(1) Giving effect to the collective bargaining agreement entered into on or about October 1, 1957, with United Mine Workers of America, its District 12, and its Locals 1227 and 1229, or to any extension, renewal or modification thereof.

(2) Recognizing United Mine Workers of America, its District 12, and its Locals 1227 and 1229, as the representative of any of its employees at the O'Fallon and Millstadt mines for the purposes of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment; unless and until said labor organizations shall have demonstrated their exclusive majority representative status pursuant to a Board conducted election among the Company's employees; said election to be conducted as early as possible under applicable rules, regulations and practices; it being understood that Peabody need not bargain with any union claiming to represent the employees at

the O'Fallon and Millstadt mines until the Board has certified the results of the election so held.

(3) Assisting and contributing support to United Mine Workers of America, its District 12, and its Locals 1227 and 1229, or to any other labor organization.

(4) Encouraging membership in the above named labor organizations, or in any other labor organization of its employees, by discriminating in regard to hire or tenure of employment or any term or condition of employment, except to the extent permitted by the proviso to Section 8 (a) (3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

(5) In any other manner interfering with, restraining or coercing employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Progressive Mine Workers of America, District 1, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as authorized in Section 8 (a) (3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

b. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(1) Withdraw and withhold all recognition from United Mine Workers of America, its District 12, and its Locals 1227 and 1229, as the representative of any of its employees at the Millstadt and O'Fallon mines for the purpose of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment unless and until the said labor

organizations shall have demonstrated their exclusive majority representative status pursuant to a Board-conducted election among the said employees;

(2) Make whole all employees at its O'Fallon and Millstadt mines for any loss of earnings they may have suffered by reason of the discriminatory lockout, as found herein;

(3) Preserve and, upon request, make available to the National Labor Relations Board, or its agents, for examination and copying, all records necessary for the determination of the amount of back pay due under this Decree.

(4) Post at its Millstadt and O'Fallon mines copies of the notice attached hereto and marked "Appendix A". Copies of said notice to be furnished by the Regional Director for the Fourteenth Region shall, after being duly signed by Peabody's authorized representative, be posted immediately upon receipt thereof, in conspicuous places, including all places where notice to employees is customarily posted, and maintained for a period of sixty (60) consecutive days. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material;

(5) Post at the same places and under the same conditions as set forth in (4) above, and as soon as they are forwarded by the aforesaid Regional Director, copies of the Unions' notice herein, marked "Appendix B";

(6) File with the said Regional Director within ten (10) days from the date of this Decree a report setting forth in detail the steps which it has taken to comply with this Decree.

The United Mine Workers of America, its District 12, and its Locals 1227 and 1229; their officers, representatives, agents, successors and assigns, shall:

a. Cease and desist from :

(1) Giving effect to the agreement of on or about October 1, 1957 with Peabody Coal Company, or to any extension, renewal, modification, supplement, or other contract with said employer, unless and until said labor organizations shall have demonstrated their exclusive majority representative status pursuant to a Board-conducted election among the employees of Peabody Coal Company, at its O'Fallon and Millstadt mines;

(2) Restraining or coercing the employees of Peabody Coal Company, at its O'Fallon and Millstadt mines in the right to select or not to select the United Mine Workers, its District 12 and its Locals 1227 and 1229 as their bargaining representative and to join or not to join said labor organizations, except to the extent that such right may be affected by an agreement executed as authorized by the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

b. Take the following affirmative action, which the Board has found will effectuate the policies of the Act:

(1) Post at the business offices of District 12 and Locals 1227 and 1229, copies of the notice attached hereto and marked "Appendix B". Copies of said notice, to be furnished by the aforesaid Regional Director, shall, after being duly signed by an official representative, be posted immediately upon receipt thereof and be maintained for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material;

(2) Mail to the said Regional Director signed copies of the notice attached hereto and marked "Appendix B"

for posting at the Company's Millstadt and O'Fallon mines;

(3) Notify the said Regional Director, in writing, within ten (10) days from the date of this Decree what steps the Unions have taken to comply with the Decree.

s/ F. Ryan Duffy,
Judge, United States Court of Appeals for the Seventh Circuit.

s/ Elmer J. Schnackenberg,
Judge, United States Court of Appeals for the Seventh Circuit.

s/ Frederick O. Mercer,
Judge, United States District Court, Southern District of Illinois, sitting by designation on Court of Appeals for the Seventh Circuit.

[APPENDIX A.]

Notice to All Employees of Our O'Fallon and Millstadt Mines.

Pursuant To

A Decree of the United States Court of Appeals for the Seventh Circuit enforcing an Order, as modified, of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We Will Not encourage membership in United Mine Workers of America, its District 12, and its Locals 1227 and 1229, or in any other labor organization, of our employees, by discriminating in regard to hire, tenure, or any term or condition of employment, except to the extent authorized by Section 8 (a) (3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

We Will Not give effect to any and all agreements and contracts, supplements thereto or modifications thereof, or any superseding contract with the above-mentioned labor organizations with respect to the employees at the O'Fallon and Millstadt mines.

We Will Not contribute support to the above-named labor organizations.

We Will withdraw and withhold recognition from the above-named labor organizations, or any successor thereto, with respect to the employees at the O'Fallon and Millstadt mines, unless and until they shall have demonstrated exclusive majority representative status pursuant to a Board-conducted election among our employees at the said mines.

The bargaining units are:

(1) All employees at the O'Fallon mine covered by the 1952 contract between Progressive and the Coal Producers' Association of Illinois, and

(2) All employees at the Millstadt mine covered by the same contract, excluding such categories of employees as required by law.

We Will Not give effect to any checkoff cards, heretofore executed by our employees, authorizing deductions from their wages for remittance to United Mine Workers of America, its District 12, and its Locals 1227 and 1229.

We Will Not in any other manner interfere with, restrain, or coerce our employees in the exercise of their statutory rights.

All our employees are free to become, remain, or refrain from becoming or remaining members of any labor organization, except to the extent that this right may be affected

by agreements in conformity with Section 8 (a) (3) of the National Labor Relations Act, as amended by the Labor Management Reporting and Disclosure Act of 1959.

Peabody Coal Company,
(Employer)

By .....
(Representative) (Title)

Dated .....

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[APPENDIX E.]

Notice to All Members of United Mine Workers of America, Its District 12, and Its Locals 1227 and 1229, and to All Employees of Peabody Coal Company at Its Millstadt and O'Fallon Mines.

Pursuant To

A Decree of the United States Court of Appeals for the Seventh Circuit enforcing an Order, as modified, of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby give notice that:

We Will Not give effect to our agreements of, on or about October 1, 1957, or to any other contract with Peabody Coal Company covering employees at the above-named two mines, unless and until we shall have demonstrated our majority representative status pursuant to a Board-conducted election among employees at the aforesaid mines.

We Will Not restrain or coerce the employees of the said employer in their right to select or not to select the United Mine Workers, its District 12, and its Locals

1227 and 1229 as their bargaining representative, and to join or not to join said labor organizations except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, executed in conformity with Section 8 (a) (3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

United Mine Workers of America,
(Labor Organization)

By .....
(Representative) (Title)

Dated .....

District 12, United Mine Workers of America,

By .....
(Representative) (Title)

Dated .....

Local 1227, United Mine Workers of America,
(Labor Organization)

By .....
(Representative) (Title)

Dated .....

Local 1229, United Mine Workers of America,
(Labor Organization)

By .....
(Representative) (Title)

Dated .....

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX E.

Text of Pertinent Provisions of Labor Management Relations Act of 1947, 61 Stat. 136, as Amended.

Section 7 (29 U. S. C. A. 157)

Section 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

* * * * * * *

Section 8 (29 U. S. C. A. 158).

Section 8. (a) It shall be an unfair labor practice for an employer

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: **Provided,** that subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to

encourage or discourage membership in any labor organization: **Provided**, that nothing in this Act, or any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: **Provided further**, that no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * * * *

Section 10 (29 U. S. C. A. 160).

Section 10.

* * * * * * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: **Provided,** that where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: **And provided further** that in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of

any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceedings a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside, in whole or in part the order of the Board. No objection that has been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by

substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

* * * * * * *

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Nos. 938 and 939

In the Supreme Court of the United States

OCTOBER TERM, 19[illegible]

PEABODY COAL COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

UNITED MINE WORKERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ARTHUR J. GOLDBERG

ROBERT B. WATTS

MORTON HOLLANDER

ARNOLD ORDMAN

ROBERT ROTHMAN

DOMINICK L. MANOLI

MORTON J. COME

ELINOR M. MODJESKA

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 938

PEABODY COAL COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

No. 939

UNITED MINE WORKERS OF AMERICA, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Company Pet. App. 1–14, Union Pet. 1a–12a) is reported at 284 F. 2d 910. The decision and order of the National Labor Relations Board (R. 54–67) [1] are reported at 125 NLRB 1256.

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[1] "R." refers to the joint appendix filed in the court of appeals.

JURISDICTION

The opinion and order of the court of appeals was issued on December 2, 1960, and the Board's petition for rehearing was denied on January 17, 1961 (Company Pet. App. 1, 15, 16; Union Pet. 1a, 12a, 13a). On February 27, 1961, Mr. Justice Clark extended the time for filing a petition for certiorari to May 1, 1961. The decree of the court of appeals was entered on April 5, 1961 (Company Pet. App. 17–25, Union Pet. 13a–20a). The petitions for writs of certiorari were both filed on May 1, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's conclusion that the employer gave assistance and support to the United Mine Workers and engaged in other conduct for the purpose of encouraging its employees to switch their allegiance from Progressive Mine Workers to United, and that United aided this illegal program by independently restraining and coercing the employees to select United as their representative.

2. The petition in No. 938 presents the further question whether, in the circumstances of this case, the provisions of the Board's cease and desist order are too broad.

STATUTES INVOLVED

The relevant statutory provisions are set forth in the petitions (Company Pet. App. 26–30; Union Pet. 21a–23a).

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

In May 1956, the Peabody Coal Company, herein called the Company, acquired control of the Millstadt and O'Fallon mines in Illinois (R. 8–9; 199–200, 649).[2] For about 20 years, the Progressive Mine Workers, herein called Progressive, had been the exclusive bargaining representative of the employees at these mines (R. 9; 203–204, 231), and a party to collective bargaining agreements with the Coal Producers Association of Illinois, through which the Company and its predecessors had bargained. The expiration date of Progressive's current contract with the Company was September 30, 1957 (R. 9). All employees at the mines were members of Progressive at least until June 10, 1957 (R. 722).

The Company, as a member of the Illinois Coal Operators Association, has for many years recognized the United Mine Workers of America, herein called UMW, as exclusive bargaining representative at its 27 other mines (R. 9; 276–277, 446, 555), and has been a party to a collective bargaining agreement with UMW which includes the National Bituminous Coal Wage Agreement of 1950, as amended (R. 9, 18–19, 55; 699–717). The National Bituminous Agreement purports to cover "all of the bituminous coal mines owned or operated" by the signatory em-

[2] The mines were originally acquired through a subsidiary, but Peabody acquired direct ownership as a result of liquidation and merger proceedings completed by October 1957 (R. 7–9) and is now the only corporation involved.

ployers as well as the "operation of all coal lands * * * acquired during" the term of the agreement (R. 9–10; 700).

In May or June of 1957, Hugh White, President of UMW's District 12, notified William V. Hartman and H. C. McCollum, the Company's general mine superintendent and vice president, respectively, that the Company "must comply with the provisions in the [National Bituminous Agreement]" by recognizing UMW and applying the terms of the contract at the Millstadt and O'Fallon mines (R. 10; 227–279, 685, 281–283, 377, 404, 417–418, 441–442, 462). His demand was based upon the provisions of the National Bituminous Agreement noted above (R. 700) and not upon a claim that UMW represented any of the employees at these mines (R. 10; 278, 282–283, 417–418, 442). McCollu and Hartman agreed that the contract "did apply to the Company's operations" and that they would apply it as a matter of course when their contract with Progressive expired, and when UMW could show a majority (R. 10–11; 284–286).

At about the same time, White asked Hartman for a list of the names and addresses of the employees of the Millstadt mine. Hartman, assuming that White wanted the list for an organizing campaign at the mine, complied with the request (R. 13; 404–405). McCollum, with actual knowledge that that was the purpose for which the information would be used, furnished White with a similar list for the O'Fa' n mine (R. 13; 459–460).

On July 1, 1957, the UMW sent letters to all employees at both mines.[3] The letters noted the Company's recent purchase of the mines, and stated that the National Bituminous Agreement applied to or covered all of the mines owned or operated by signatories to the Agreement and that, "Recently the United Mine Workers of America has served notice on the Peabody Coal Company that they must comply with the provisions in the contract, and all provisions of the contra[illegible] be applied at the [Millstadt and O'Fallon mines]." The letter requested that "each and every employee subject to the jurisdiction of the contract" become a UMW member, and noted that no initiation fee would be charged (R. 15–16; 685–687, 693–695).

On July 4, 1957, Ray Dupee, president of Progressive's District No. 1, wrote the Company, after learning of UMW's demand, and cautioned the Company to comply with the Progressive agreement and the wishes of "your employees as to union affiliation" (R. 27–28; 228, 683–684). The Company did not reply to Dupee's letter (R. 28; 228). Dupee made numerous attempts to contact the Company in an effort to ascertain the Company's position on the UMW demand, but was consistently told that the parties with whom he wished to speak were "not available" (R. 28; 229).

The annual vacation for employees at the Millstadt and O'Fallon mines, during which the mines were to

[3] The letters were reprinted in a local newspaper on July 3, 1957 (R. 19, fn. 6; 697).

be closed, was scheduled for the period June 28 to July 8, 1957 (R. 19; 226–227, 298, 314, 349, 392). Because of repair work being done, the scheduled reopening of the Millstadt mine was later postponed until July 15 (R. 20; 298, 314, 382). The repair work was completed on July 12, but the Company did not open the mine until July 20 (R. 20; 298–301, 309, 315, 334–335, 382–383, 395, 425). Mine superintendent Schroeder informed a repair crewman that the mine would not open because the Company had a standing agreement with UMW not to operate a mine unless it was UMW, and that the Company could not operate two mines and have its other 27 mines shut down (R. 20; 299–300, 305–306, 308, 316, 428). Schroeder stated that "it looks like there will be no work unless we go United" (R. 300, 308). When Frank Krietner, president of Progressive's local at the Millstadt mine, asked whether the mine would remain closed unless the employees joined UMW, General Superintendent Hartman declined comment and then read Kreitner a letter from the UMW, dated July 10, which demanded full compliance with the National Bituminous Agreement (R. 20–21; 319–334). When Hartman finished reading the letter, he commented: "That's it, boys, United is forcing us to comply" (R. 21; 322, 327, 334).[1] When the mine was reopened on July 20, Foreman Pruessing asked why the plant had started up, and Hart-

[1] During the week of July 15, Schroeder told another employee that the mine would not reopen "until the union or the company had got things settled" (R. 22; 339–340).

man replied that he believed "that United got enough cards among the men" (R. 23, fn. 9; 720).

The O'Fallon mine was scheduled to reopen July 9. The Company informed Progressive, however, that the mine would not reopen until further notice (R. 24; 349–350). Despite Progressive's repeated inquiries, the Company refused to give any reason for the shutdown (R. 24; 350–351). Finally, Progressive was able to arrange a meeting with Company Vice-President McCollum on July 17, at which time McCollum apologized because the Company had not notified them sooner that the "State Mining Inspector at Large had closed the mine down" because of "bad air" (R. 24–25; 351–352). Stanley Feist, president of Progressive's local at the O'Fallon mine, who was aware that the mine had never been shut down in the past for that reason and that no official notices had been posted around the mine as required by law, asked McCollum if the real reason for the mine's shutdown was the UMW's demand (R. 24–25; 351–353, 371). McCollum responded by handing Feist a copy of the UMW's July 10 letter which demanded that the Company comply with the terms of the UMW contract by giving effect to it at all of the Company's mines. McCollum then stated that "the Peabody Coal Company had 29 mines and it wouldn't run two under Progressive and have the 27 under United shut down (R. 25; 353–354, 368–382, 717).[5]

[5] McCollum added that the Company had no alternative in the matter, and that after the Progressive contract expired on September 30, "There would not be another contract signed by Peabody with Progressive" (R. 25; 354–355, 368, 372, 452).

The Company finally opened the O'Fallon mine on July 22 (R. 25; 355, 452).

On July 13 and 19, the Company notified the Coal Producers' Association, through which the Company was under contract with Progressive, that the Company was withdrawing from membership in the Association effective September 30, 1957 (R. 29–30; 213–214, 215–216, 407–408, 679–680). The letter also revoked the Association's authority to represent the Company in bargaining with Progressive. Also on July 19, the Company advised Progressive of its withdrawal from the Association, and notified Progressive that the current contract would be treated as terminated on September 30, 1957 (R. 30–31; 214–215, 681–683).

On August 4, Progressive protested the contemplated termination of the agreement, challenged the right of the Company and UMW to apply the UMW contract to the employees at the mines, and requested that the Company meet with Progressive as the employees' bargaining representative to negotiate a new agreement.[6] The Company never responded to this request to bargain (R. 32–33; 232–234, 688–690). On September 30, the Company terminated its contract with Progressive and ceased making the payments to Progressive's Welfare and Retirement Fund which were required by the contract (R. 33–35; 234, 620,

[6] The Trial Examiner, whose findings were adopted by the Board, found that at that time Progressive represented a majority of all of the employees at both mines and that none of the employees had revoked membership in Progressive or selection of it as their bargaining agent (R. 36).

626-627, 660). On about October 1, 1957, the Company recognized UMW and applied the UMW contract at the Millstadt and O'Fallon mines (R. 33-34; 289-290). Since October 1, the Company has been checking off membership dues, fees and assessments from wages of the employees at the two mines, and remitting them to the UMW (R. 18-19, 40; 290, 613, 614).

B. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board concluded that the Company assisted and supported the UMW in violation of Section 8(a)(2) and (1) of the Act. The illegal conduct consisted of: (1) furnishing UMW with an employee mailing list,[7] discriminatorily locking out employees at the mines, refusing to bargain with Progressive, terminating the contract with Progressive, and discontinuing payments to Progressive's Welfare and Retirement Fund—all to encourage membership in UMW; (2) entering into an exclusive bargaining contract with UMW at a time when UMW did not represent an uncoerced majority of the employees, and when that contract contained illegal closed-shop provisions.[8] The Board also found that certain of this conduct constituted discrimination in

[7] The Board did not hold that furnishing the mailing list was *per se* unlawful, but only in the context of the Company's numerous other acts of assistance (R. 54).

[8] The National Bituminous agreement contained a provision requiring that "As a condition of employment employees shall be, or become, members of the [UMW] to the extent and in the manner permitted by law." The Board concluded that the qualifying clause was not sufficient to dissipate the effect of the illegal condition set forth at the outset, and thus that the contract imposed a closed-shop requirement (R. 55-56).

violation of Section 8(a)(3) and (1) of the Act, and a refusal to bargain with Progressive in violation of Section 8(a)(5). In addition, the Board found that the UMW restrained the employees in violation of Section 8(b)(1)(A) of the Act by notifying them, at a time when they were represented by Progressive, that the UMW contract would be applied at the Millstadt and O'Fallon mines, and by executing and maintaining such contract there. Finally, the Board found that, through the closed shop provisions of the contract, the UMW caused discrimination in violation of Section 8(b)(2) (R. 35–44, 54–57).

The Board's order required the Company and the Union to cease and desist from the unfair labor practices found (R. 57–61). It also required the Company to bargain collectively with Progressive upon request, to withdraw and withhold recognition from UMW at the Millstadt and O'Fallon mines unless and until the UMW had demonstrated its majority status in a Board election, and to make the employees whole for any losses suffered by reason of the discriminatory lockout. Finally, the Company and the Union were required to reimburse employees for all dues and fees exacted from them under the closed shop provisions of the contract, and for any loss suffered by reason of the discriminatory discontinuance of the Progressive Welfare and Retirement Fund payments. (R. 59–62.)

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals upheld the Board's unfair labor practice findings as supported by substantial

evidence on the whole record, except the finding that the contract entered into between the Company and UMW contained an illegal closed-shop provision. As to the latter finding, the court was of the view that the savings clause in the UMW contract (n. 8, *supra*) was sufficient to suspend the effectiveness of its closed shop requirements. In the light of that conclusion, the court denied enforcement of the dues-reimbursement provisions of the Board's order. It also denied enforcement of that part of the Board's order which required payments to the Progressive Welfare Fund, and deleted[9] the "or any other employer" provision from the Board's cease and desist order against the UMW. (R. 61).[10] In all other respects, the court's opinion approved the Board's order.[9] (Company Pet. App. 1–14, 17–22.)

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[9] The court's holdings on the closed shop and dues reimbursement issues are consistent with this Court's decisions in *National Labor Relations Board* v. *News Syndicate Co.* and *Local 60, Carpenters* v. *National Labor Relations Board*, Nos. 339, and 68, this Term, April 17, 1961. The Board, moreover, has decided not to contest the court's action in denying enforcement of the part of its order requiring payments to the Progressive Welfare Fund, and in deleting the "or any other employer" clause.

[10] However, when the court subsequently entered its decree (Company Pet. App. 17–22), it deleted the provision of the Board's order requiring the Company to bargain with Progressive (R. 58–59). The Board has petitioned the court for rehearing on this modification, and the matter is still pending. Contrary to the position of the Company and the Union (Company Pet. 11–12, Union Pet. 41–42), we do not believe that the pendency of that motion warrants deferring a ruling on these petitions for certiorari. Whether or not a bargaining order is appropriate in the circumstances of this case, it is clear that the questions presented by the petitions do not warrant review by this Court.

ARGUMENT

1. The fundamental substantive issue raised by both petitions (Union Pet. 3–5; Company Pet. 3) is whether substantial evidence on the record considered as a whole supports the Board's unfair labor practice findings. The court below concluded, with modifications not at issue here, that substantial evidence did support the Board's order. The resolution of that factual issue adversely to petitioners does not, in the circumstances of this case, present a question warranting review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

In any event, the evidence detailed in the Statement demonstrates that there is ample support in the record for the Board's unfair labor practice findings. Thus, in May or June 1957, the UMW representative advised the Company that it desired the UMW agreement, applicable at the Company's other mines, extended to the Millstadt and O'Fallon mines, then represented by, and under contract, with Progressive. The Company gave UMW a list of the employees' names and addresses, and UMW sent each employee a letter, which was also published in the newspaper, declaring that the UMW contract was applicable to them and requesting that they become members of the UMW. When Progressive complained, the Company refused to discuss the matter. Moreover, the mines, which in the meantime had been closed for the annual vacation, were kept down beyond their scheduled reopening date while management officials told employees that operations would not be resumed unless

they switched their alliance to UMW. The Company underscored these threats by withdrawing from the Association which bargained with Progressive, notifying Progressive that it was terminating the contract, and refusing to honor Progressive's bargaining demand. As a result, the employees defected to the UMW, whereupon the Company discontinued payments into Progressive's Welfare Fund and began to apply the UMW contract to the Millstadt and O'Fallon mines.

In these circumstances, the Board was fully justified, as the court below found, in concluding that the Company's actions were designed to induce the employees to change from Progressive to UMW; that accordingly the Company contributed unlawful assistance to the UMW, and the UMW, by furthering the Company's actions and accepting the fruits thereof, restrained and coerced the employees in their free choice of a bargaining representative; and, finally, that UMW's subsequent majority was not freely acquired but tainted by the unfair labor practices.

Petitioners' contention (Company Pet. 8–11; Union Pet. 34) that the Board could not properly find that the furnishing of mailing lists to the UMW constituted illegal assistance overlooks the fact that such action was found unlawful only in the context of the entire course of conduct (see n. 7, *supra*). Even if furnishing a mailing list does not *per se* amount to an unfair labor practice, this action may properly be viewed as having more significance where, as here, it is part of a program to displace one union with another. Similarly, although the Union's letter to the

employees (p. 5, *supra*), standing alone, might not be regarded as exerting a coercive impact on them (Union Pet. 39–40), the contrary conclusion is warranted when the letter is viewed in the context of the total pattern of events. Nor are petitioners aided by emphasizing that the court below found that there was no evidence that any employee was actually coerced into paying dues to UMW, that membership in UMW was not a condition of employment, and that no employee lost his job in the changeover to UMW (Union Pet. 35–36; Company Pet. 8). Conduct may be sufficient to sustain a finding that employees were coerced or illegally encouraged in their choice of a representative even though it may not be sufficient to establish the further fact that the employees joined the "assisted" union, or paid dues to it, unwillingly. See *Local 60, Carpenters* v. *National Labor Relations Board*, No. 68, this Term, decided April 17, 1961, where the Court found that, although the employees were subjected to an illegal hiring arrangement, it did not follow that they were coerced to pay dues and fees to the union.

2. There is no substance to the Company's attack (Company Pet. 6–8) upon the provisions of the Board's order, enforced by the court below, which require the Company to cease and desist from "in any other manner interfering with, restraining or coercing employees in the exercise" of their rights under the Act (Company Pet. App. 19), and to cease and desist from "encouraging membership in [UMW] or in any other labor organization of its employees, by discriminating in regard to hire or tenure of employ-

ment or any term or condition of employment" (*ibid.*). In view of the Board's findings that the Company had committed numerous acts in violation of Section 8(a) (1), (2), (3), and (5), demonstrating a course of conduct on the part of the Company designed to impair the employees' rights to join and bargain through representatives of their own choosing, and to encourage their membership in UMW, the appropriateness of the above prohibitions cannot be doubted. *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385; *National Labor Relations Board* v. *Express Publishing Company*, 312 U.S. 426.[11]

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[11] It may be noted that the court did modify the breadth of the order in one respect (p. 11, *supra*).

Insofar as the Company attempts to suggest that there is no basis for prohibiting "discrimination in regard to hire or tenure of employment" (Company Pet. 3, 7–8), it overlooks the Board findings, enforced by the court below, of extensive violations of Section 8(a) (3) and (1) of the Act, which included the discriminatory lockout of employees, the discontinuance of welfare payments, and the execution of a contract with an unlawfully assisted union (pp. 9–10, *supra*).

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
LEE M. MODJESKA,
Attorney,
National Labor Relations Board.

MAY, 1961.

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Nos. 938 and 939

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

PEABODY COAL COMPANY, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

UNITED MINE WORKERS OF AMERICA, ET AL., *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY BRIEF TO OPPOSITION BRIEF OF NATIONAL LABOR RELATIONS BOARD

AND

RENEWAL OF MOTIONS TO DEFER CONSIDERATION OF PETITIONS

V. LEE MCMAHON
1783 Railway Exchange Building
611 Olive Street
St. Louis 1, Missouri
Counsel for Petitioner, Cause No. 938

EDMUND BURKE
508 Reisch Building
Springfield, Illinois

WELLY K. HOPKINS
HARRISON COMBS
900 Fifteenth Street, N. W.
Washington, D. C.

M. E. BOIARSKY
511 Kanawha Valley Building
Charleston, West Virginia
Counsel for Petitioners, Cause No. 939

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITIONERS' (CAUSES NOS. 938 AND 939) REPLY BRIEF TO OPPOSITION BRIEF OF NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

I. RENEWAL OF MOTIONS TO DEFER CONSIDERATION OF PETITIONS

In Petitions for Writs of Certiorari (Causes Nos. 938, 939), each containing a "Motion to Defer Consideration of Petition" (Cause No. 938, p. 11; Cause

No. 939, p. 41), Petitioners[1] recited that National Labor Relations Board[2] had filed with the Seventh Circuit a petition for clarification or modification and amendment of its opinion of December 2, 1960, relating to that Court's having set aside Board's order concerning Peabody Coal Company's obligation to bargain with Progressive Mine Workers. In its opposition brief[3] filed with this Court in the instant causes, Board states (p. 11), that "the matter is still pending". However, on May 25, 1961, the Seventh Circuit issued its opinion, declining to modify its opinion or mandate but reciting its reasons for not requiring Peabody to bargain with Progressive Mine Workers. The Seventh Circuit's opinion appears as Appendix A hereto. Its order denying the petition appears as Appendix B hereto.

In the deferment motions, petitioners urged that should Board seek review of the Seventh Circuit's decree of April 5, 1961 (Petition, No. 939, App. 14a) which provides, *inter alia*, Peabody need not bargain with Progressive, consideration of the petitions conjointly with that of Board would serve to present a clearer and more complete picture of the various issues presented in the case before the Seventh Circuit than a consideration of each petition separately.

[1] The term "Petitioners" herein refers to Peabody Coal Company, Petitioner in Cause No. 938, and United Mine Workers of America; District 12, United Mine Workers of America; Local Union 1227, United Mine Workers of America; and Local Union 1229, United Mine Workers of America, Petitioners in Cause No. 939.

[2] Herein, National Labor Relations Board will be called "Board".

[3] The abbreviation "O.B." refers to Board's opposition brief.

Petitioners' positions are emphasized in the light of the Seventh Circuit's May 25, 1961 opinion. Therein, though it declares, "we do not hold the UMW is now the authorized representative of the employees at the two mines" explains that under the case's circumstances, a Board election is the appropriate method to determine the employees' choice, and holds that it is "an entirely futile act to now require Peabody to bargain with a union which has not represented its employees for three and one-half years", it is most pertinent that the Court declares that

> "*In 1957, the employees at both mines involved in this case clearly indicated their choice of UMW as their representative*" (App. 2a).

While Board (O.B. 11, fn. 9) indicates its acceptance of the Seventh Circuit's adverse holdings against it as to the union-security clause, dues reimbursements and reimbursement to Progressive's welfare fund, it does not foreclose its seeking certiorari on the bargaining issue (*Ibid*, p. 11, fn. 9 and 10),[4] which stresses the necessity of petitioners' renewing their respective motions that the Court defer consideration of the instant petitions until Board attitude on the bargaining issue is clarified.

For the foregoing reasons, and those assigned by petitioners in their respective petitions, petitioners now renew said motions.

---

[4] See footnote 5 herein.

II. PETITIONERS' REPLY TO BOARD'S OPPOSITION BRIEF

No attempt will be made to reply, *seriatim*, to Board's brief in opposition to the granting of writs of certiorari herein. Petitioners submit that answers thereto are contained in their respective petitions. In addition, the Court's attention is directed to the following particular matters appearing in the opposition brief.

It is a cogent fact that, although petitioners (Petition, No. 939, pp. 24 *et seq.*) charge that Board's findings and conclusions were reached by ignoring vital and undisputed evidence clearly challenging Board's views, *there is no denial of this charge in Board's opposition brief.* Though Board, alluding to the Unions' letter of July 1, 1957, to the employees, attempts to justify Board's finding of coercive impact when "viewed in the context of the total pattern of events" (O.B. 14), the vice of Board's opposition brief, like its decision, is that that is precisely what Board failed to do in arriving at its findings and conclusions and, importantly it has never denied the charge of its failure —either in the Seventh Circuit or in this Court. Petitioners' complaint of the Seventh Circuit's findings is based upon its failure to implement the congressional standard recognized by this Court's *Universal Camera Corporation* v. *NLRB*, 340 U.S. 474. It is noteworthy that in attempting to justify the Board's findings, Board asserts "the evidence detailed in the statement demonstrates that there is ample support in the record for the Board's unfair labor practice findings" (O.B. 12); but the Board fails, as this Court stated in the *Universal Camera* case, to implement the principle that "*substantiality of evidence must take into account*

whatever in the record fairly detracts from" the weight of Board's findings.

Though the Seventh Circuit made clear that no employee was actually coerced into paying dues to UMW, that membership in UMW was not a condition of employment, and that no employee lost his job in the change-over to UMW, Board asserts that petitioners are not aided by those findings (O.B. 14). *Local 60, Carpenters* v. *NLRB*, No. 68, this term, decided April 17, 1961, cited by Board (O.B. 14), affords Board no support, since Board fails to point out the Seventh Circuit's findings included also that "no employee of either of the coal mines . . . complained of any coercion or discriminatory conduct" (Petition, No. 939, App. 2a), that "no employee claims his rights under Section 7 were violated" (*Ibid*, 7a), and that "there are no findings of actual coercion in the instant case nor any evidence which would have supported such findings" (*Ibid*, 10a). There is a lack of accuracy in Board's statement (O.B. 10) that "The court of appeals upheld the Board's unfair labor practice findings as supported by substantial evidence." First, the lack of "substantial evidence" has been noted both herein and in the petition (Cause No. 938). Secondly, clearly there is no consonancy between the Board's findings of employee coercion and interference (R. 54-7) and the Seventh Circuit's repeated recitals above quoted that employees were not coerced or discriminated against. In the light of these Seventh Circuit's findings, Board's opposition brief affords no support for its position that "UMW's subsequent majority was not freely acquired but tainted by the unfair labor practices" (O.B. 13). In its denial of Board's bargaining order, the Seventh Circuit accented that

"employees . . . *clearly* indicated their choice of United Mine Workers of America as their representative" (App. 2a), which is one of the vital facts ignored.

Board asserts (O.B. 10) its order required petitioners to desist from the unfair labor practices found. This is not accurate. Upon Unions' complaint that Board's order was too broad, the Seventh Circuit agreed and held that the order should be limited to the employees of the two mines involved; that the words "or any other employer" should be deleted; and that the order "should be limited to UMW's and Peabody's actual unfair labor practices in this case" (Petition, No. 939, App. 11a). Unions complained in their petition (Cause No. 939) that the Seventh Circuit's decree that Unions cease restraining and coercing employees was totally at variance with its findings of no coercion, and that Board, its Examiner and the Seventh Circuit alike failed to give consideration to that "body of evidence opposed to the Board's view", contrary to the *Universal Camera* case.[5] Board's opposition brief does not challenge this contention.

Similarly, Peabody, in its petition (Cause No. 938, p. 6, *et seq.*), complained the Seventh Circuit's order was too broad. Its reasons appear therein. Board's opposition brief fails to supply an adequate answer

[5] In Board's opposition brief (p. 11, fn. 9), Board asserts the Seventh Circuit's holdings on the alleged closed shop and dues reimbursement issues are consistent with recent cases of this Court, and that Board has decided not to contest the Seventh Circuit's action in denying enforcement of its order requiring payments to the Progressive Welfare Fund and in deleting the "or any other employer" clause. Obviously, Board is telling this Court that it disagrees with the Seventh Circuit's holdings that the order should be limited to the employees of the two mines involved and to Unions' and Peabody's actual unfair labor practices in this case and that its intention is to seek certiorari on such holdings.

thereto, and it makes no attempt to respond to Peabody's charge that there should be settled the question with respect to an employer's furnishing a list of employees to one of two contending unions.

CONCLUSION

Petitioner (in Cause No. 938) and Petitioners, and each of them (in Cause No. 939), pray that the respective petitions for writs of certiorari filed by each should be granted as prayed for in their respective petitions, for the reasons assigned in such petitions and herein, and that this Honorable Court defer consideration of said petitions for certiorari, pursuant to motions in said petitions, renewed herein.

Respectfully submitted,

V. LEE MCMAHON
1783 Railway Exchange Building
611 Olive Street
St. Louis 1, Missouri

Counsel for Petitioner,
Cause No. 938

EDMUND BURKE
508 Reisch Building
Springfield, Illinois

WELLY K. HOPKINS
HARRISON COMBS
900 Fifteenth Street, N. W.
Washington, D. C.

M. E. BOIARSKY
511 Kanawha Valley Building
Charleston, West Virginia

Counsel for Petitioners,
Cause No. 939

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

September Term 1960 — April Session 1961

No. 12889

PERRY COAL COMPANY and PEABODY COAL COMPANY, et al., *Petitioners*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

No. 12915

UNITED MINE WORKERS OF AMERICA, et al., *Petitioners*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

UPON BOARD'S PETITION FOR MODIFICATION OR CLARIFICATION

May 25, 1961

Before DUFFY and SCHNACKENBERG, Circuit Judges, and MERCER, District Judge.

DUFFY, *Circuit Judge*. The National Labor Relations Board has petitioned for a modification of our opinion in *Perry Coal Company* v. *NLRB*, 284 F. 2d 910, or in the alternative, for a clarification of the ground upon which this Court relied for holding that Peabody need not bargain with any union until after a Board election.

We decline to modify the opinion or the mandate herein. However, we think it proper to state our reasons for not requiring Peabody to bargain with Progressive Mine Workers.

The Board found that the Company violated section 8(a)(5) of the Act by refusing to bargain with Progressive.

To remedy this unfair labor practice, the Board ordered the Company to resume bargaining with Progressive. The Board argues that the Supreme Court has made it clear that where a bargaining relationship has been unlawfully disrupted or frustrated, the appropriate remedy is to require the employer to bargain, and give the relationship a fair opportunity to become established. In support of their contention, the Board cites *NLRB* v. *P. Lorillard Co.*, 314 U.S. 512, and *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702.

It is clear from the two cases just cited, the Board may adopt such a remedy in an appropriate case. However, the power of the Board to fashion remedies is not limitless. The Board may not apply "a remedy it has worked out on the basis of its experience, without regard to circumstances which may make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act." *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349.

We examine the Board's order to resume bargaining with Progressive in the light of the undisputed facts and circumstances of this case. The contract of Progressive terminated by its terms in September, 1957. Progressive has not represented the employees here involved for more than three and a half years. In 1957, the employees at both mines involved in this case clearly indicated their choice of United Mine Workers as their representative. It seems to us to be an entirely futile act to now require Peabody to bargain with a union which has not represented its employees for three and a half years.

We wish to make it clear that we do not hold the United Mine Workers is now the authorized representative of the employees at the two mines. We do hold, however, that under the circumstances of this case, a Board election is the appropriate method to determine the choice of the employees. It seems reasonable that this determination should be made as quickly as possible so that normal labor

relations can be restored at the two mines involved. We cannot understand, under the circumstances of this case, why the Board insists on Peabody bargaining with Progressive when there is no evidence in this record to show that organization would be the employees' choice since the time Peabody assumed control or ownership of the O'Fallon and Millstadt mines.

To insist that Peabody now bargain with Progressive would be like jousting with windmills. Any realistic appraisal of the situation in this case indicates that such a course would be entirely futile, and would, in all likelihood, have no result other than to arouse bitterness and antagonisms.

We think the situation here is similar to that which faced the Court in *NLRB* v. *Marcus Trucking Co.*, 2 Cir., 286 F. 2d 583. There, the Board found the employer had violated section 8(a)(5) of the Act by recognizing a second union during a period when the employer was bound by the "contract bar" rule from recognizing any other union. The Board ordered the employer to cease from recognizing the second union unless and until it was certified by the Board and to recognize and bargain with the original union in the meanwhile. The Court modified the Board's order and conditioned enforcement upon the Board's holding an election within sixty days after the Court's order became final. The Court said cases like *Franks Bros.* do not prescribe an iron-clad rule and held:

> "Although we affirm the Board's holding of an unfair labor practice, this was surely at the periphery and not the center of § 8(a); the interest being vindicated here is not so much the direct interest of the employees in freely choosing their bargaining representatives as the broader interest in industrial peace. We fail to see how that would be promoted by forcing respondent to recognize a union whose claim to contract bar protection expired more than eighteen

months ago, which ceased to represent the employees over a year before that, and which may not be their choice today, when an election can so easily tell." (at page 594)

For these reasons we adhere to our holding that Peabody need not bargain with any union until after a board-conducted election.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Thursday, May 25, 1961

Before

Hon. F. Ryan Duffy, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Frederick O. Mercer, District Judge

No. 12889

PEABODY COAL COMPANY and PEABODY COAL COMPANY, et al., *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

No. 12915

UNITED MINE WORKERS OF AMERICA, et al., *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

This matter comes before the Court upon the petition of the National Labor Relations Board for clarification or modification of the opinion of this Court heretofore filed on December 2, 1960.

On consideration whereof, It Is Hereby Ordered by the Court that the said petition for clarification or modification be, and the same is hereby, Denied, in accordance with the opinion of this Court filed this day.

A True Copy:

Teste:

KENNETH J. CARRICK
Clerk of the United States Court of Appeals for the Seventh Circuit.